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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1955

No. .....

JAMES ROBERT PALMER and LENORE PALMER,
PETITIONERS:

VS.

THE UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above cause on December 14, 1955.

Opinions Below

The opinion of the Circuit Court of Appeals, Tenth Circuit, is not yet reported, and is appended hereto as Appendix I together with the judgment of said Circuit Court of Appeals.

Jurisdiction

Judgment was entered against Petitioners on the 14th day of December, 1955, and no orders of any nature were entered respecting a rehearing. An extension of time in which to file Petition for Writ of Certiorari was entered by this Court on January 13, 1956, by the terms of which Petitioners were given to and including February 11, 1956, in which to file Petition for Writ of Certiorari.

The statutory provision believed to confer jurisdiction on this Court to review the judgments of the Circuit Court of Appeals is 28 U.S.C. 1254, by the terms of which the judgments of the Court of Appeals may be reviewed by means of Certiorari.

Questions Presented

The questions presented for review in this cause are as follows:

1. Defendants are jointly charged in Count I of a five-count information with violation of that statute relating to mail fraud, specifically 18 U.S.C. 1341. The information alleges that as part of a scheme by Defendants to defraud purchasers of chattel mortgages and to obtain money and property by false pretenses, Defendants, well knowing that said representations are false, represented that a certain chattel mortgage, as follows, would be valid: Executed by James K. Morris, on or about the 1st day of October, 1951, securing a principal balance due in the amount of $1,730.00, monthly payments thereon to be in the amount of $131.41 per month, which mortgage had been assigned to Denver Motor Finance Company on the 22nd day of August, 1951.

During trial, the Court allowed an amendment to the information to conform to the Exhibit supporting this

allegation to show that the mortgage was in fact executed August 1, 1955, rather than October 1, 1951, secured a principal balance of $2,041.40 rather than $1,7300.00, with monthly installments thereon in the amount of $113.41 rather than $131.41 as alleged in the information. The question presented for review is whether this substantial amendment was proper under Rule 7 (e) of the Federal Rules of Civil Procedure.

2. Defendant, J. Robert Palmer, was charged in Count II with the violation of 15 U.S.C. 77q (a)(1), (unlawful use of instruments of communication in interstate commerce and mails for purpose of defrauding in sale of securities) and that as part of his scheme, he mailed to one Wells M. Coleman, a letter making certain false representations, which letter was signed "J. R. Palmer." Defendant J. R. Palmer testified that he had not signed the letter; the government's handwriting expert testified that the Defendant had not signed this letter. In view of the fact that this letter was used by the Government to prove part of the allegations of Count II, was its admission into evidence, over objection, proper?

3. Where Defendant was charged with a scheme and to violate 15 U.S.C. 77q (a)(1), and Counts II, III, IV, and V of a five count information allege acts in futherance of said scheme, defendant was found guilty and sentenced for the violation of each count. Was it proper to treat each count as a separate crime as has been done heretofore in this cause, or was the entire scheme and the acts in furtherance thereof just one offense?

4. Was the admission into evidence, over objection, of certain prejudicial and important letters error where the letters were not written by defendant nor attributable to defendants, the writers of said letters not having testified nor the letters properly identified?

5. Was an instruction in error in a case charging five counts which advised the jury that, "* * * in the event you have a reasonable doubt *upon the whole case* as to either defendants being proven guilty, then it will be your duty to resolve that doubt in his or her favor and acquit him or her." (Emphasis added.)

Statutory Provisions

The following statutes are involved in this case:

18 *U.S.C.* 1341: Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of fraud or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article or anything represented to be or anything held out to be such counterfeit or spurious, for the purpose of executing such scheme or artifice or attempting so to do, so placed in any post office or other depositories for mail matter, any matter or thing whatever to be sent or delivered by the post office department, or takes or receives therefrom any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned for not more than five years or both.

15 *U.S.C.* 77*q* (*a*)(1): It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or commerce in Interstate Commerce by the use of the mails, directly or indirectly, (1) To employ any device, security or artifice to defraud.

Rule 7 (*e*) *Federal Rules of Criminal Procedure*: The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the Defendant are not prejudiced.

Statement

Defendants in the District Court were charged jointly with the violation of 18 U.S.C. 1341, being mail fraud. The first count of the information alleges, among other things, that the Defendants devised, and intended to devise, a scheme to defraud purchases of chattel mortgages executed in their favor, and that in futherance of said scheme, negotiated a certain fraudulent chattel mortgage to the Denver Motor Finance Company. It was represented that said chattel mortgage had been executed by one James K. Morris, on or about the first day of October, 1951, negotiated August 22, 1951, securing a principal balance of $1730.00 (Tr. 4). During trial, Plaintiff's Exhibit 1, being the said chattel mortgage, or a copy thereof, was offered into evidence by the Government. The exhibit showed that the chattel mortgage described in the information was in fact executed on the first day of August, 1951; was in the principal amount of $2,041.40; and that the monthly payments thereon were $113.41. Upon motion of the Government's attorneys, the District Court permitted an amendment of the information to conform to the exhibit (Tr. 78).

In counts 2 through 5 of the information, the Defendant, James Robert Palmer, alone, was charged with the violation of 15 U.S.C. 77q (a)(1), the unlawful use of instruments of communication in interstate commerce and mail, for purpose of defrauding in the sale of securities (Tr. 5). Count 2 of said information (Tr. 5) charges that

the Defendant caused to be incorporated the Ace Finance Company, Inc., a Colorado corporation, and falsely represented, among other things, that the company was licensed and bonded to do business in any city in the United States; was guaranteed 100% by National Surety Bond to every stockholder; that the company keeps certain money in reserve for repurchase of any preferred stock; that the company was audited by the controller of the currency of the State of Colorado every three months; and that the company, having some stockholders as high as $60,000.00, did not want any investment under $25,000.00 (Tr. 8).

The above representations appeared in a letter directed to Mr. C. W. Coleman in Russell, Kansas, on Ace Finance Company stationery, being purportedly signed by James Robert Palmer (Tr. 32). It is represented in paragraph 9a, e, f, i and k of count II of the information that the matters set forth hereinbefore and contained in the Coleman letter were part of the representations made for the purpose of defrauding and obtaining money and property from victims of this alleged scheme (Tr. 6 and 7). In each of the remaining others, No. 3 (Tr. 8), No. 4 (Tr. 10), No. 5 (Tr. 11), these provisions were incorporated by reference.

It is of importance to note that it was alleged in Count II of the information, and at the time of trial, that as part of Defendants' scheme to defraud, the above quoted letter to Coleman was used by Defendant in futherance of the said scheme.

The evidence on trial shows that the Defendant, James Robert Palmer, attempted to sell preferred stock in Ace Finance Company, Inc., by reason of certain advertisements placed in the Wichita Beacon, a newspaper of gen-

eral circulation in the City of Wichita, Kansas (Plaintiffs Exhibit 1-I), and by reason of certain letters and representations directed to the prospective investor in the firm. It was futher alleged and established, over objection of Defendant, that the Coleman letter set forth hereinafter was part of the scheme employed by Defendant to use the mails to defraud. It is admitted that after these conversations, Coleman did invest monies in the Ace Finance Company, Inc. (Tr. 37).

Defendant, James Robert Palmer, denied having written the letter (Tr. 35). It should also be noted that the Government's handwriting expert witness confirmed this by stating that this letter was not signed by the Defendant, James Robert Palmer (Tr. 117).

With reference to the negotiation of the chattel mortgage, as alleged in count I, it is admitted that the mortgage, Exhibit 1, was negotiated by the Defendant, James Robert Palmer, to the Denver Motor Finance Company, but it is futher alleged by said Defendant that the mortgage, Exhibit 1 was a valid and subsisting chattel mortgage, on which a motor number representing another car had been erroneously placed (Tr. 157).

The jury found the Defendants guilty on count 1 of the information, and further, the Defendant, James Robert Palmer further guilty on counts 2, 3, 4 and 5 of the information. The defendant, James Robert Palmer, was sentenced to imprisonment for a period of three years upon each of counts 1, 2, 3, 4 and 5 of the information, it being ordered by the court that the terms of imprisonment upon count 2 should commence upon the expiration of the terms of imprisonment upon count 1, and that the terms of imprisonment upon counts 3 and 4 should run concurrently with the term of imprisonment on count 2; further,

that the term of imprisonment on count 5 should run concurrently with the term of imprisonment on count 1.

The Defendant, Lenore Palmer, was placed on probation for a period of three years on her conviction of count 1 of the information term set forth.

Each of these convictions and judgments were upheld by the United States Circuit Court of Appeals, Tenth Circuit.

Federal Jurisdiction

The basis for the jurisdiction of the Federal Court in the first instance is that statute known as 18 U.S.C. 3231 by which the district courts are vested with jurisdiction to try all offenses against the laws of the United States.

POINTS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI

A

The allowance of the amendment to Count I of the Information was in violation of the provisions of Rule 7(e) of the Federal Rules of Criminal Procedure inasmuch as a new offense was charged against defendants and substantially prejudiced their rights. The question presented is one of construction and applicability of Rule 7(e), and presents an important federal question which has not been, but should be, settled by this Court. The allowance of said amendment was such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

The original information included the specific charge that in violation of 18 U.S.C. 1341 (Mail Fraud), and for the purpose of defrauding and obtaining money by false pretenses, a certain chattel mortgage executed by one

James K. Morris on the 1st day of October, 1951 was negotiated by defendants on the 22nd day of August, 1951. That this mortgage was in the principal amount of $1730., to be paid in monthly installments of $131.41 per month. This was charged as the basic ingredient of the scheme to defraud by use of the mails. Thereafter it appears that this was not the mortgage at all; the mortgage introduced into evidence (or a copy thereof) as Plaintiff's Exhibit I was executed in fact on the 1*st day of August*, 1951, was in a completely different amount ($2041.40), and that the monthly payments thereon were in the amount of $113.41.

The proof of this Count rested, in part, on this chattel mortgage; the mortgage itself constituted the basic ingredient of the scheme to defraud and was the gravaman of the offense as charged.

Rule 7(e) of the Federal Rules of Criminal Procedure allows an amendment to the information provided, "no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced."

It is apparent to Petitioners that if the mortgage as recited in the information had actually existed, the proof thereof would have not sustained Petitioner's conviction, for it would have been a legal impossibility to negotiate a chattel morgage on August 22, 1951 which had not as yet been executed, and was not in fact executed until October 1 of the same year. It is clear, therefore, that the amendment resulted in a completely different offense being charged. For with the amendment allowed, the negotiated mortgage which constituted the heart of the offense was completely different than the one charged. A scheme or artifice which results in the commission of a criminal offense must necessarily be composed of certain factors specifically including the article or thing (in this case, the

mortgage) which had been sent or directed through the mail. It certainly cannot be contended that this mortgage in this case was not a part of the offense as charged in Count I. Otherwise, why should the Government even bother to set the same forth in its information? It must certainly be agreed that it is an essential part of the offense in this cause as charged in Count I of the information.

In *United States v. Personal Finance Co. of New York*, 13 F.R.D. 306, the information originally alleged in substance that the defendant failed to preserve true records and further falsified records to conceal the true purposes of loans. Prior to trial, the Government attempted to amend the information to allege that the defendant failed to preserve "for the life of the obligations to what they relate * * * such books of account, records and other papers * * * as were relevant to establishing whether or not the credits qualified for exemption * * *.

The Court reasoned that if the amendment were permitted, it would result in the allegation of a different offense.

The Court stated: "But Rule 7(e) plainly makes as a condition of permitting amendment to an information that no new or different offense be charged therein. The Government has failed to show that it comes within the rule. It has merely adverted to the stenographic burden which would attach to it were it required to file a superseding information. If the amendment were here permitted, Rule 7(e) would be emptied of meaning and defendant deprived of a right given it by the rule * * *. The elimination of technicalities does not require the obliteration of the rules."

If the basic ingredients of the offenses as charged can be changed at any time at the request of the Government,

the Rule is obliterated indeed. It would eventually result in the Government having to charge nothing more in an information than cite the section of the Code charged. The facts constituting a crime would be unimportant from the standpoint of the information. This practice would undoubtedly be contrary to the intent of the law.

It is further submitted that the rights of the defendant Lenore Palmer should be carefully guarded on this Petition for Writ of Certiorari. For it should be noted in passing that in the record prepared for the appeal to the Circuit Court of Appeals, Mrs. Palmer's direct testimony was entirely omitted (Tr. 146). Her testimony has not been presented to any appellate tribunal even though she, too, was convicted on this Count I. This irregularity is respectfully submitted to the Court for its consideration in connection with this Petition for Writ of Certiorari.

In conclusion on this specific question, it is respectfully submitted that the amendment as allowed was in violation of the Federal Rules of Criminal Procedure and presents a question upon which this Court should pass; that it further constituted a complete departure from the accepted and usual course of judicial proceedings, and substantially prejudiced the rights of these Petitioners.

B

In Count III of the information, charging defendant James Robert Palmer with the Unlawful Use of Instruments of Communication in Interstate Commerce and Mails for the Purpose of Defrauding in the Sale of Securities, 15 U.S.C. 77q (a)(1) (Tr. 5-8), it was alleged that defendant mailed, or caused to be mailed, the following letter, in furtherance of his scheme to defraud:

"ACE FINANCE INCORPORATED
326 W. 8 St. Ph. 6400
Pueblo, Colorado

'C. W. Coleman, Rt. 2 Russell, Kansas

'Dear Mr. Coleman: In answer to your letter of January 10th, in regard to the Finance Company in our city, we wish to inform you that we will be glad to explain the deal thoroughly upon receipt of how much money you have to invest in preferred stock. Any Company that is licensed and bonded to do business in any city in the United States is guaranteed 100% by National Surety Bond to every Stock holder.

'Today we have more than three thousand dollars worth of invested stock. Any money paid for preferred stock is returnable after 6 months by giving a thirty day written notice. All stock must be sold back to the Company. The company keeps this money in reserve to buy any loan standing in preferred stock. A person may draw 6% interest every six months.

'We are audited by the controller of the currency of the State of Colorado every three months and when you are licensed and bonded it is sound and safe. The writer will be glad to go over documented data on such matters. We do not want any investment under 25,000.00. We have some stock holders as high as 60,000.00

'If you are interested any further we will send documents or call on you in the near future, as he has other people near your town.

Yours truly,

/s/ J. R. Palmer

J.R.P/at

Ace Finance Incorporated"

This letter was admitted into evidence as Plaintiff's Exhibit 7, and the Government's attorneys in introducing the letter into evidence said to the witness: "This is from Palmer here" (Tr. 32). When objection was made as to the admissibility of the letter, the United States Attorney said: "Your Honor, it is typewritten, bears the signature of J. R. Palmer. The witness got it through the mail."

The letter was admitted into evidence even though the recipient thereof, Mr. Coleman, testified that defendant Palmer had denied the writing of the letter in his conversations with Coleman (Tr. 35). Later in the trial the Government's handwriting expert witness, James V. P. Conway testified that this Exhibit was not signed by either Defendant (Tr. 117). At no time during the trial of this case was the writer of the letter identified, nor was it ever shown that the letter was written under the direction and authorization of Defendant Palmer.

This letter tended to prove a substantial part of the allegations of Count II of the Information. It was clearly inadmissible under the circumstances without further foundation having been laid to link the letter to the defendant James Robert Palmer. The highly prejudicial effect of the letter is apparent. The admission thereof was not only error, but was so far removed from accepted and sanctioned judicial practices that it calls for the exercise of the supervisory powers of this Court.

C

Certain other Exhibits were admitted into evidence improperly, and only served to blacken the character of the defendant on the basis of incompetent, irrelevant and highly prejudicial statements.

One such was Plaintiff's Exhibit 46, being a letter

from one William Davis to Mrs. Katherine Rainbolt confirming a dispute between the addressee and these defendants over a debt of $15,000.00 which the defendants owed her (Tr. 166). The letter cast a definite reflection on defendant Palmer because of this indebtedness and complaints made by Mrs. Rainbolt against Palmer. Neither the writer nor the addressee were ever in Court, nor was any other foundation laid for the admission of this Exhibit. It was completely immaterial and irrelevant to the issues in this case, and had nothing whatever to do with the fradulent sale of securities. The opinion of the Circuit Court of Appeals (see Appendix) states that the letter was inadmissible.

Another letter in the same category is Plaintiff's Exhibit No. 11. This was a letter to Coleman from one C. B. Parker congratulating Coleman on his investment in the Ace Finance corporation and appears at Tr. 39. The Government's handwriting expert could not identify the writer of this letter (Tr. 117), nor was the identity of the writer ever established at the trial. The letter was clearly incompetent evidence and should have been excluded.

Both of the above letters were offered as proof of the violation of 15 U.S.C. 77q (a)(1). First, they were incompetent. Secondly, both must have a prejudicial effect upon the character of defendant and his undertakings. Defendant Palmer was entitled to the presumption of innocence. The admission of improper exhibits such as these constitute such an improper reflection on defendant that they were certainly prejudicial. Again, the Petitioners respectfully request that the Court exercise its supervisory powers and grant this Petition for the further consideration of the evidence admitted in this cause.

D

The following instruction was given in this case:

"The defendant is presumed to be innocent of the charge until his or her guilt is established by legal evidence beyond a reasonable doubt and in the event you have a reasonable doubt *upon the whole case* as to either of the defendants being proven to be guilty, then it will be your duty to resolve that doubt in his or her favor and acquit him or her." (Tr. 182) (Emphasis added.)

In the instant case, the defendant James Robert Palmer was charged with the violation of five separate counts. This instruction fails to point out that each count should have been separately considered by the jury, and the jury directed that the defendant could only be convicted on each count as it stood by itself and not in connection with the entire case; that if the jury had reasonable doubt as to any count the defendant could not be convicted thereof. This instruction is in conflict with the judicial precedent as laid down by the Eighth Circuit Court of Appeals in *Spear v. United States,* 228 F. 485. This, also, was a mail fraud case of five counts. With respect to reasonable doubt, the trial court instructed in part as follows:

"It means this: that taking all the evidence together, *upon the whole question,* are you satisfied beyond a reasonable doubt that he is guilty? If you are, then your verdict should be guilty. If you are not, then your verdict should be not guilty." (Emphasis added) In reversing, the Circuit Court stated:

"We think the instruction is misleading. It tends to induce a jury, impressed by the evil character of some part of the transaction, to overlook the lack of proof

of a vital factor of the offense, and to find guilt in a general sense."

The instruction might even be more misleading in the instant case for the reason that the elements of Count II of the Information are incorporated in Counts III through V thereof. This language, being so general in nature, could easily lead the jury to infer that a finding of guilty on Count II could reasonably lead to the conclusion of guilty on all other counts. Thus, there would be a conclusion of guilt in a general sense.

In conclusion upon this specific point, it is submitted that the Circuit Court of Appeals for the Tenth Circuit, in affirming the conviction based on this instruction, has rendered a decision in conflict with the decision of the Eighth Circuit Court on the same matter, and that the conflict should be settled by this Court.

CONCLUSION

In conclusion, it is submitted that each question herein presented to this Honorable Court presents justification for the exercise of the Court's supervisory powers in determining the matters more fully. It is respectfully requested that this Court issue its Writ of Certiorari for the further determination thereof.

James Robert Palmer &
Lenore Palmer, *Pro Se*,
240 Josephine Street,
Denver, Colorado.

APPENDIX

OPINION

[December 14, 1955]

Eugene H. Tepley (Roy O. Goldin was with him on the brief) for Appellants;

Donald E. Kelley, United States Attorney (Robert Swanson, Assistant United States Attorney was with him on the brief) for Appellees.

Before PHILLIPS, Chief Judge, HUXMAN, United States Circuit Judge and SAVAGE, United States District Judge.

SAVAGE, District Judge.

Appellants, James Robert Palmer and Lenore Palmer, were convicted on Count 1 of a five count information of using the mails in a scheme to defraud in violation of 18 U.S.C § 1341. Palmer was convicted on Counts 2, 3 and 4 of using the mails to defraud in the sale of securities in violation of 15 U.S.C. § 77q (a)(1), and also convicted on Count 5 of another violation of the mail fraud statute. Mrs. Palmer was placed on probation for a period of three years. Palmer was sentenced to a term of imprisonment of three years on each count, the sentence on Count 2 to run consecutively to the sentence imposed on Count 1 and the sentences on Counts 3 and 4 to run concurrently with the sentence imposed on Count 2 and the sentence on Count 5 to run concurrently with the sentence imposed on Count 1.

Appellants were charged in Count 1 with having devised a scheme and artifice to defraud purchasers of chattel mortgages executed in favor of James Robert Palmer and Lenore Palmer, doing business as Ace Motors, and to obtain money and property by false and fraudulent pretenses from such purchasers. It was alleged that, for the

purpose of executing the fraudulent scheme, the appellants caused to be placed in the United States mail two certain notes and chattel mortgages which were false and fraudulent.

Appellants complain of their convictions on this count upon grounds that, (1) the evidence was insufficient, and (2) they were prejudiced by an amendment of the information permitted during the trial.

In the spring of 1951, Ace Motors, which was owned and operated by appellants at Pueblo, Colorado, entered into a floor plan mortgage agreement whereby Denver Motor Finance, Denver, Colorado, agreed to advance money for the purpose of financing Ace Motors' new car business. By the terms of the agreement Denver Motors Finance advanced money on the security of new cars purchased from the factory. When one of the cars on which money had been advanced was sold and a note and mortgage obtained from the purchaser, Denver Motor Finance would release the car and take an assignment of the note and mortgage from Ace Motors and apply the amount thereof to reduce its indebtedness. On August 22, 1951, Ace Motors caused an "Installment Sale Contract—Note and Mortgage" to be mailed to Denver Motor Finance at Denver, Colorado, which was purportedly executed by James K. Morris on August 1, 1951, covering a 1951 Hudson 4-door Sedan, Motor No. 4A95216, in the sum of $2,041.40, and assigned by Ace Motors to Denver Motor Finance on August 22, 1951. This instrument was fictitious and fraudulent and had been signed by Mrs. Palmer on behalf of Ace Motors and acknowledged by Palmer. The car described in the mortgage had been sold by Ace Motors to one Leandro Mestas on June 27, 1951, who paid the full purchase price. Mestas had not mortgaged the car and was the owner at the time the Morris instrument was fab-

ricated. Payments to be applied on the Morris note were sent to Denver Motor Finance by Ace Motors.

On October 4, 1951, Ace Motors caused a second "Installment Sale Contract—Note and Mortgage" to be mailed to Denver Motor Finance at Denver, Colorado. This instrument was purportedly executed by Anita Watkins and delivered on October 4, 1951, covering a 1951 Hudson 4-door Sedan, Motor No. 8A106228, in the sum of $2,000, and assigned on the same date by Ace Motors to Denver Motor Finance. It was also false and fraudulent. The car described had been sold by Ace Motors to one Byron A. Wydman on July 10, 1951. Wydman was the owner of this car at the time the Watkins instrument was fabricated. Palmer personally sold this car to Wydman, who obtained a loan from A. W. Otterstein on July 10, 1951, secured by a chattel mortgage on the car, and used the proceeds to complete payment. This chattel mortgage to Otterstein was executed in Palmer's office at the time of the sale. Payments on the Anita Watkins notes were made by Ace Motors. Anita Watkins was Lenore Palmer's name by a former marriage. To allay suspicions with respect to this transaction, Mrs. Palmer wrote a fictitious letter to herself signing it "Anita Watkins" and then forwarding it to Denver Motor Finance.

The elements of the offense charged in this count are the scheme to defraud or for obtaining money or property by means of false pretenses and the use of the mails for the purpose of executing such scheme. The evidence tended to establish that appellants devised a scheme to defraud Denver Motor Finance by delivery of fictitious notes and chattel mortgages in order to procure the release of new cars from the floor plan mortgage. Both of the spurious chattel mortgages were mailed at Pueblo, Colorado, and received by Denver Motor Finance at Denver. The

James K. Morris mortgage was acknowledged by Palmer as a notary Public, and the assignment was executed by Mrs. Palmer. The evidence of guilt of both appellants on Count One is overwhelming.

We find no merit in the contention that appellants were prejudiced by the amendment of the information during the trial to conform to the proof. It was alleged in the information as follows:

> "* * * that a certain chattel mortage executed by one James K. Morris, 205 Madison, Pueblo, Colorado, on or about the *1st day of October* 1951, was a valid and subsisting chattel mortgage upon a 4-door sedan Motor No. 4A 95216, Serial No. 4A 95216; that James K. Morris had agreed to pay *$1730.00 to Ace Motors* in eighteen consecutive monthly installments of *$131.41* each beginning September 15, 1951, which said mortgage, on or about the 22nd day of August, 1951, was assigned to Denver Motor Finance * * *."

But the Morris mortgage received in evidence was to some extent at variance with the foregoing. The date of the purported execution was August 22, 1951, rather than October 1, 1951. The amount to be paid was $2,041.40 in 18 monthly installments of $113.41, instead of $1,730.00 in 18 monthly installments of $131.41. It was the order of the trial court permitting amendment of the information to accurately describe the Morris mortgage of which complaint is made.

Rule 7(e) of the Federal Rules of Criminal Procedure provides:

> "The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

The appellants argue that no offense was charged in the original information because it was impossible to assign on August 22, 1951, a mortgage which was not executed until October 1, 1951. They assert that the amendment resulted in an offense being stated where none had been stated before. But this argument is based upon a misconception of the offense charged in Count One. As heretofore observed, the two essential elements of the offense are the scheme to defraud and the use of the mails for the purpose of executing the fradulent scheme. Webb v. United States, 10 Cir., 191 F.2d 512.

An accurate description of the fictitious mortgages which were alleged to have been used in the scheme to defraud was not an essential ingredient of the offense charged. The amendment allowed by the court related only to the identity of the mortgage and not to the substance of the offense. The information as originally filed charged an offense, and the allowance of the amendment to conform to the proof did not effect any change in the offense charged. The case of United States v. Personal Finance Company of New York, S.D., N.Y., 13 F.R.D. 306, relied upon by the appellants is not in point. There the amendments to the information sought to be made, which the court would not permit, would have resulted in the charging of a different offense.

In addition, it is apparent that the appellants suffered no prejudice. The description of the Morris mortgage in the original information was sufficiently accurate to disclose its identity to appellants. The name and address of the purported mortgagor were correctly given; the car covered by the mortgage was properly described, including the motor and serial numbers, and the date of the assignment of the mortgage by appellants was correctly given. The appellants could not have been sur-

prised, nor was any claim of surprise made. Under these circumstances we are entirely satisfied that the substantial rights of the defendants were not prejudiced by the amendment.

In Counts 2 to 5 inclusive, it was charged that Palmer devised a scheme to defraud purchasers and prospective purchasers of preferred stock of Ace Finance, Inc., a Colorado corporation, and to obtain money by false pretenses by making many false representations in an effort to persuade persons to purchase such preferred stock. Separate uses of the mail by deposit or mail matter in the postoffice at Pueblo, Colorado, addressed to persons who were solicited by Palmer were made the basis of these four counts.

Palmer does not contend that the evidence is insufficient to support his conviction on these counts, but he seeks reversal because of alleged errors by the trial court in the admission and exclusion of evidence and in the instructions to the jury. A brief summary of the evidence will suffice.

Palmer caused the Ace Finance, Inc. to be incorporated under the laws of Colorado in June of 1951, ostensibly for the purpose of engaging in the finance business. He became its president and general manager. In December of 1951, he caused an ad to be run in the Wichita Beacon, Wichita, Kansas, under the column "Money Wanted", promising to pay six per cent interest on investments in Ace Finance. Inquiries followed from persons desiring to make investments, some of which were answered by mail. Palmer thereafter personally called on prospects.

Among the misrepresentations made from time to time by Palmer were statements that each account was insured up to $10,000; that the current dividend was six

per cent; that each investment was guaranteed by an agency of the federal government; that the sum of $25,000 was carried in a reserve to make refunds to investors who wanted their money back; that Ace Finance was audited every three months by the Controller of Currency of the State of Colorado; and that a small rubber stamp exhibited by him was proof that his company was under a $75,000 bond. In addition, false representations were made from time to time that various parties had invested in the preferred stock of Ace Finance. The only intended victim who actually succumbed was one Wells M. Coleman, of Russell, Kansas, who invested $6,000 in the preferred stock.

Palmer urges that the court erred in admitting Exhibit 7, a typewritten letter on the letterhead of Ace Finance bearing the typed signature "J. R. Palmer". This letter was mailed at Pueblo, Colorado, on January 14, 1952, addressed to Wells M. Coleman, Russell, Kansas, and received by the addressee. It was objected to on the ground that it was not shown that it was written by Palmer nor signed by him.

This letter was in reply to one written to Ace Finance asking for information. Coleman's inquiry was inspired by the ad inserted by Palmer in the Wichita Beacon. Palmer called on Coleman at his home to solicit an investment shortly after the letter was received. When Palmer was interrogated about the letter on cross examination, he apologized for one false statement contained therein. This contention by Palmer is based on the erroneous premise that the government had the burden of showing that he either personally signed the letter or posted it for mailing. It was not necessary to show that the letter was written, signed or posted by Palmer. It is enough if he, in carrying out the scheme to defraud, caused

the letter to be mailed, and this fact, like any other, may be found from circumstances. Butler v. United States, 10 Cir., 53 F.2d 800. The mailing of this letter was essential to the proof of guilt on Count Two. The circumstances in proof in the case warranted its admission by the court and a finding by the jury that Palmer caused the letter to be mailed. Complaint is made by Palmer of the admission in evidence of Exhibit 8, a blotter mailed from the office of Ace Finance, in Pueblo, Colorado, to Coleman, and Exhibit 11, a letter purportedly written by C. B. Parker, as secretary of Ace Finance, to Coleman congratulating him upon his investment, upon the ground that it was not established that these mailings were ascribable to Palmer. The short answer to this contention is that Palmer testified upon cross-examination that he had the girls in the office mail all letters and blotters which were received from Ace Finance by Mr. Coleman, Mr. Grewell, Mrs. Suhr and others.

It is next asserted that the court committed error in admitting into evidence Exhibits 2, 4 and 5, being certain records of the Wichita Beacon designed to prove the content of the Wichita Beacon ad and to show that Palmer caused the ad to be inserted and paid for it. These exhibits were produced and identified by Nathan Kobey, a Denver attorney and assistant secretary of the corporation which published the Wichita Beacon. Kobey testified that these records were made in the regular course of business. Objection to the admission of these exhibits was made upon grounds that they were not kept under the supervision and direction of the witness and that he had no personal knowledge of the making of the records. This argument is without merit. The records became admissible upon proof that they were made in the usual course of business. The lack of personal knowledge by the wit-

ness of the facts recorded and other circumstances may be shown to affect their weight. 28 U.S.C.A. §1732. Furthermore this evidence could not have been prejudicial. It was cumulative. A postoffice inspector testified that Palmer made an admission to him that he had caused the ad in question to be placed in the Wichita Beacon and his testimony was not refuted by Palmer.

It is next argued that the court improperly excluded evidence pertaining to the amount of loss sustained by Ace Finance in a fire which occurred in November of 1952. An offer of proof was not made, and we do not know what loss would have been claimed had the testimony been admitted. The trial court properly ruled that this evidence was not material to any issue in the case. The misrepresentations alleged to have been made by Palmer with respect to the financial condition of the company pertained to its financial condition in the early months of 1952.

The propriety of admitting in evidence Exhibit 46 presents a more substantial question. This exhibit was a letter written on April 23, 1952, on stationery of Ace Finance to Mrs. Rainbolt. It was signed by William Davis, who had worked for Ace Finance for a period of about sixty days. It referred to some letters written by Mrs. Rainbolt in which she had said that she owned stock in Ace Finance, Inc. Davis says therein that he had checked the records and did not find that she had ever invested money in the company. Reference is then made to an indebtedness of Palmer and Mrs. Palmer to Mrs. Rainbolt in the sum of $15,000, which Palmer had apparently attempted to discharge by delivery of preferred stock of Ace Finance. Palmer is referred to as an employee and as the general manager of the company. Davis closes the letter by admonishing Mrs. Rainbolt not write any more letters about the company. It is urged that this letter was

not shown to have been written by direction of Palmer, was not material to any issue in the case and was highly prejudicial.

The government suggests that the letter was admissible to show that the preferred stock issued to Mrs. Rainbolt had not been paid for, and that the only preferred stock of the company issued and outstanding was that of Wells Coleman.

The amount of the preferred stock of Ace Finance, Inc. issued and outstanding was not a material issue in the case. In addition, there was no evidence tending to prove that the letter was written by Palmer or at his direction. The letter was inadmissible but a careful examination of the whole record convinces us that its erroneous admission was not prejudicial and does not warrant a reversal of the case. Rice v. United States, 10 Cir., 149 F.2d 601.

Complaint is made of certain instructions given to the jury. Counsel for appellants, in reply to an inquiry made by the trial court before the jury retired, stated that he had no objections to the instruction. Rule 30 of the Federal Rules of Criminal Procedure provides that "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" The obvious purpose of the rule is to afford the judge an opportunity to correct erroneous instructions before the jury retires to consider its verdict. United States v. Furlong, 7 Cir., 194 F.2d 1. While the court will notice plain errors affecting substantial rights although not brought to the attention of the court, the belated objections made to the instructions, even if well

founded would not justify a reversal of the case. Moreover, a careful consideration of the instructions in their entirety convinces us that they adequately state the law and the incorrectness of one paragraph or one phrase, standing alone, would not constitute reversible error. McFarland v. United States, U. S. App., D.C., 174 F.2d 538.

Palmer finally contends that Counts 2, 3, 4 and 5 are invalid as imposing unauthorized multiple penalties. It is well settled that each separate use of the mails in the execution of a scheme to defraud constitutes a separate offense. Badders v. United States, 240 U.S. 391; Mitchell v. United States, 10 Cir., 142 F.2d 480. The same rule applies to the use of mails in a scheme to defraud in the sale of securities. Palmer cites and relies on the recent case of Bell v. United States, 349 U.S. 81. It was there held that the simultaneous transportation of more than one woman in violation of the Mann Act constituted only one offense and not a separate offense for each woman transported. The court's construction of the Mann Act in the Bell case obviously may not be regarded as a departure from the rule laid down in the Badders case in which the court dealt with the mail fraud statute.

The Judgments are AFFIRMED.

Judgment, Case No. 5113.

Nineteenth Day, November Term, Wednesday, December 14th, 1955.

Before Honorable Orie L. Phillips, Chief Judge, Honorable Walter A. Huxman, Circuit Judge, and Honorable Royce H. Savage, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that James Robert Palmer, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

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